APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-1971

Terri Ann Miener, by and through her next friend and parent, Clyde J. Miener,

Appellant,

v.

State of Missouri, and Joseph P. Teasdale, Governor; Department of Elementary and Secondary Education of the State of Missouri, Arthur L. Mallory, Commissioner of Education of the Department of Elementary and Secondary Education of the State of Missouri; Dr. Leonard Hall, Assistant Commissioner of Education, The Division of Special Education of the Department of Elementary and Secondary Education of the State of Missouri, The Special School District of St. Louis County, Missouri; The Board of Education of the Special School District of St. Louis County, Missouri; Allan G. Barclay, Gerald K. Braznell, and Gerald B. Hansen, Directors of the Special School District of St. Louis County, Missouri; Mr. Thomas E. Smith, Superintendent of Schools of the Special School District of St. Louis County, Missouri; Department of Mental Health of the State of Missouri, Joe L. Winter, Commissioner of the Department of Mental Health of the State of Missouri; Paul R. Ahr, Acting Director of the Department of Mental Health of the State of Missouri; Mr. John Twiehaus, individually and in his official capacity as the Acting Superintendent of the St. Louis State Hospital; Dr. Milton Fujita, individually and in his former official capacity as Medical Director of the Youth Center of the St. Louis State Hospital, Missouri State Board of Education,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: April 15, 1981

Filed: February 4, 1982

Before BRIGHT, HENLEY and ARNOLD, Circuit Judges.

HENLEY, Circuit Judge.

Appellant Terri Ann Miener, by and through her guardian and next friend Clyde J. Miener, brought this action against several state and local governmental entities to secure rights allegedly due to her as a handicapped person. She sought declaratory, injunctive and monetary relief pursuant to 42 U.S.C. § 1983; the Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355 (1973), 29 U.S.C. §§ 701 *et seq.* (the Rehabilitation Act); the Education for All Handicapped Children Act of 1975, Pub. L. 94-142, 89 Stat. 773 (1975), 20 U.S.C. §§ 1401 *et seq.* (EAHCA or the Education Act); and the equal protection clause of the fifth and fourteenth amendments.[1] Appellant appeals several orders[2] of the district court which, taken together, serve to dismiss her claims to damage relief on the merits prior to hearing.

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[1] Appellant also asserted a pendent state tort claim which is not here at issue.

[2] Most of the issues on appeal arise from an order and memorandum opinion dated January 25, 1980, published at 498 F. Supp. 944 (E.D. Mo. 1980). The remaining issues involve an order and memorandum opinion dated September 19, 1980, published at 494 F. Supp. 949 (E.D. Mo. 1980).

We assume jurisdiction pursuant to 28 U.S.C. § 1291. We reverse in part and affirm in part the district court's dismissal, and remand the case for further proceedings consistent with this opinion.

Appellant has a history of serious medical problems highlighted by the occurrence and reoccurrence of a brain tumor, initially at age two, and later at age fourteen. As a result of this condition and attendant surgery, she suffers serious learning disabilities and behavioral disorders.

Appellant alleged[1] that she was a voluntary resident at facilities of the Missouri Department of Mental Health beginning in June, 1977. From this time until April, 1980 when she was removed to a private facility, appellant claimed that she was deprived of an appropriate free education in violation of the Education for All Handicapped Children Act, 20 U.S.C. § 1411. She also alleged that defendants denied her equal access to educational facilities, in violation of the antidiscrimination provisions contained in Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and in violation of 42 U.S.C. § 1983.

Numerous individuals and political bodies and agencies were named as defendants, including the State of Missouri and its Chief Executive Officer, Governor Joseph P. Teasdale; the Missouri Department of Elementary and Secondary Education, and its Commissioner, Arthur Mallory, and Assistant Commissioner, Dr. Leonard Hall; the Missouri Department of Mental Health, its acting Director, Dr. Beverly Wilson, and the Commissioner of Mental Health for the State of Missouri, Norman

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[1] In reviewing the granting of defendants' motion to dismiss, we view the complaint in the light most favorable to the plaintiff, *Jackson Sawmill Co.* v. *United States*, 580 F.2d 302, 306 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979), and take its allegations as true. *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972).

Tice; the acting Superintendent of the St. Louis State Hospital, John Twiehaus, and the former Medical Director of the Youth Center at that Hospital, Dr. Milton Fujita; the Special School District of St. Louis County, Missouri, its Board of Education, its Directors, Allan Barclay, Gerald Braznell, and Gerald Hansen, and its Superintendent of Schools, Thomas Smith.

Appellant prayed for injunctive relief in the form of equal access to all programs and facilities of the St. Louis State Hospital and participation in the special education programs of the St. Louis County Special School District. She asserted a right to damages in the amount of $50,000.00 for deprivation of her constitutional right of equal protection and statutory rights, and $474,358.00 for violation of her statutory right to a full and adequate education. She sought prospective relief in the form of compensatory educational services to overcome the effects of any past denial of special educational services.

The district court initially ordered appellant to pursue administrative remedies under the EAHCA and Missouri statutes. On January 25, 1980 the court dismissed appellant's claims for damages under the Rehabilitation and Education Acts on the ground that no private cause of action for damages exists pursuant to these statutes. The court also dismissed all claims pursuant to 42 U.S.C. § 1983, while refusing to dismiss the enforcement claims asserted under the Education Act and § 504 of the Rehabilitation Act. The pendent tort claim and the claim for compensatory education also remained.

In the course of pursuing administrative remedies, the parties eventually settled the enforcement claims. A settlement agreement, approved by the district court on April 23, 1980, provided for appellant's placement, education and psychiatric treatment in the Crittenton Center and Hickman-Mills School District in Kansas City, Missouri.

The state defendants thereafter, on July 8, 1980, filed a motion to dismiss the claim for compensatory education on the ground that this was a claim for damages which must fall in accordance with the district court's dismissal of damage claims in its January 25, 1980 order. On September 19, 1980 the district court agreed, dismissing the claim for compensatory education as a request for damages barred by the eleventh amendment. The state tort claim was dismissed without prejudice. The motion of the St. Louis County Special School District for summary judgment was dismissed as moot.

Appellant's primary allegations on appeal are that the district court erred in (1) ruling that a private right of action for damages is not available under Section 504 of the Rehabilitation Act; (2) ruling that a private right of action for damages cannot be implied under the Education Act; (3) dismissing her claim under 42 U.S.C. § 1983 for failure to state a claim; (4) dismissing her claim for compensatory education as an action for damages barred by the eleventh amendment. Because we reverse in part the district court's dismissal, we are obliged also to reach the allegation that the district court abused its discretion in denying appellant leave to amend her complaint.

The crux of this appeal is whether a cause of action for damages can be entertained under any of the statutes relied on by appellant. This inquiry necessarily involves a two-step analysis. We ask first whether a private cause of action may be asserted pursuant to the statutes named in her complaint. As a separate question, we examine the propriety of damage relief. *Davis* v. *Passman*, 442 U.S. 228, 244 (1978) (implication of a right of action is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive).

I. PRIVATE CAUSE OF ACTION.

(A) Section 504 of the Rehabilitation Act

The district court held, correctly we believe, that under the test of *Cort* v. *Ash*, 422 U.S. 66 (1975), and the authority of *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), individual plaintiffs have a private cause of action under Section 504 of the Rehabilitation Act. The weight of authority in this and other circuits supports the implication of a cause of action. *See Pushkin* v. *Regents of the University of Colorado*, No. 81-1224 (10th Cir. Sept. 4, 1981); *Simon* v. *St. Louis County*, 656 F.2d 316 (8th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3404 (U. S. Nov. 17, 1981) (No. 81-850); *Kling* v. *County of Los Angeles*, 633 F.2d 876 (9th Cir. 1980); *Carmi* v. *Metropolitan St. Louis Sewer District*, 620 F.2d 675 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980); *Camenisch* v. *University of Texas*, 616 F.2d 127, 131 (5th Cir. 1980), *vacated on other grounds*, 101 S. Ct. 1830 (1981); *NAACP* v. *Medical Center, Inc.*, 599 F.2d 1247, 1258-59 (3d Cir. 1979); *Davis* v. *Southeastern Community College*, 574 F.2d 1158, 1159 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); *Leary* v. *Crapsey*, 566 F.2d 863 (2d Cir. 1977); *United Handicapped Federation* v. *Andre*, 558 F.2d 413, 415 (8th Cir. 1977); *Kampmeier* v. *Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977); *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277, 1284-87 (7th Cir. 1977) (but expressly leaving open the question whether enforcement regulations yet to be issued might limit judicial remedies, at n.29).

We find no reason to reiterate the thorough review of legislative history contained in the above-cited authorities. We expressly note, however, that we have reexamined these cases in light of recent Supreme Court decisions which could be perceived to offer an opportunity for a different result. For reasons more fully

indicated in the footnote,[4] we are persuaded that recent Supreme Court rulings should not change our finding of a private cause of action under § 504.

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[4] The Supreme Court has expressly declined to decide whether private action can be implied under Section 504. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 404-05 n.5 (1979). *But see Campbell* v. *Kruse*, 434 U.S. 808 (1977), in which the Court vacated and remanded a district court decision that partial tuition grants to handicapped children denied equal protection. The Court directed the district court to decide the case based on Section 504, thus suggesting that a private right of action exists under the statute.

The Court has also refined the threshold question of the *Cort* test, which asks whether the statute was enacted for the benefit of a special class of which the plaintiff is a member. *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). Under this test, a private cause of action will be readily found "where the language of the statute explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff." *Universities Research Ass'n* v. *Coutu*, 101 S. Ct. 1451, 1462 (1981), *quoting Cannon* v. *University of Chicago*, 441 U.S. 677, 690 n.13 (1979). There is less reason to infer a private remedy if Congress has framed the statute as "a general prohibition or a command to a federal agency." *Id.*

Section 504 of the Rehabilitation Act is drafted with an unmistakable focus on the benefited class of handicapped persons, providing:

> No otherwise qualified handicapped individual in the United States, as defined in section 706 (7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by an Executive agency or by the United States Postal Service.

29 U.S.C. § 794. We conclude that the implicaton of a cause of action under § 504 is, if anything, bolstered by the Supreme Court's refinement of the *Cort* test.

Finally, we are not persuaded to reach a different conclusion by the case of *Pennhurst State School & Hospital* v. *Halderman*, 101 S. Ct. 1531 (1981), in which the Supreme Court held that a statute enacted pursuant to the Spending Power alone did not create substantive rights for disabled persons because new legal duties were not declared

The barrier to appellant's Section 504 cause of action, if any, lies in an aspect of standing which we raise *sua sponte* as a jurisdictional matter. This barrier involves the incorporation of Title VI remedies into the Rehabilitation Act. Section 504 of the Rehabilitation Act provides by its terms that no otherwise qualified individual shall be discriminated against under any program or activity receiving federal financial assistance. 29 U.S.C. § 794. Section 505 breathes remedial life into this provision by making available to the aggrieved plaintiff the procedures and remedies of Title VI of the Civil Rights Act of 1964.[5] The incorporation of Title VI remedies, however, has proved to be a double-edged sword. Section 604 of Title VI, 42 U.S.C. § 2000d-3, states:

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through clearly imposed conditions rather than mere precatory language. *Id.* at 1540, 1543-45. At least one court has thought the *Pennhurst* analysis should apply to determine whether § 504 imposes an obligation on a state such as can be enforced through a private cause of action. *Tatro* v. *Texas*, 516 F. Supp. 968, 984 (N.D. Tex. 1981). We conclude to the contrary that *Pennhurst* is inapplicable. *Accord, Pushkin* v. *Regents of the University of Colorado*, No. 81-1224, slip op. at 11-12 (10th Cir. Sept. 4, 1981). We note without deciding that § 504 at least arguably rests not on Congress's Spending Power but on Congress's power to secure the guarantees of the fourteenth amendment. *See* Comment, "Employment Discrimination Against the Handicapped: Can *Trageser* Repeal the Private Right of Action?" 54 N.Y.U.L. Rev. 1173, 1174 & nn.5-8 (1979) (and citations therein). Moreover, nondiscrimination against handicapped persons is an undisputed condition for the receipt of federal funding. In sum, the analysis in *Pennhurst* is simply irrelevant to determining a § 504 cause of action. *Cf. Lieberman* v. *Univ. of Chicago*, No. 80-2549, slip op. at 8-10 (7th Cir. Sept. 23, 1981) (Swygert, Sr.J., dissenting) (reaching same conclusion as to Title IX).

[5] The incorporation of Title VI remedies occurred by amendment of the Rehabilitation Act in 1978. A new § 505 was added to provide in part:

> *Nothing* contained in this subchapter *shall be construed to authorize action* under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization *except where a primary objective of the Federal financial assistance is to provide employment.*

(emphasis added). This express limitation on standing under Title VI gives rise to the question whether Congress intended the limitations in Title VI to apply in an action under § 504.

Judicial thought on this question is divided. *Compare* cases regarding Section 604 of Title VI as a limitation on standing under Section 504, *Simon* v. *St. Louis County, supra,* 656 F.2d at 319 n.6; *Simpson* v. *Reynolds Metals Co.,* 629 F.2d 1226, 1234 and n.13 (7th Cir. 1980); *United States* v. *Cabrini Medical Center,* 639 F.2d 908, 910-11 (2d Cir. 1981); *Carmi* v. *Metropolitan St. Louis Sewer District, supra,* 620 F.2d at 674-75; *Trageser* v. *Libbie Rehabilitation Center, Inc.,* 590 F.2d 87, 88-89 (4th Cir. 1978), *cert. denied,* 442 U.S. 947 (1979); *with Carmi* v. *Metropolitan St. Louis Sewer District, supra,* 620 F.2d at 679 and n.11 (McMillian, J., dissenting); *North Haven Board of Education* v. *Hufstedler,* 629 F.2d 773, 786 (2d Cir. 1980) (closely analogous context of Title IX), *cert. granted,* 450 U.S. 909 (1981). Cases in this Circuit which have regarded Section 604 as a limitation on standing, however, have involved allega-

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> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 [29 U.S.C. § 794] of this Act.
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Pub. L. 95-602, 92 Stat. 2955, 2983 (1978), codified as 29 U.S.C. § 792a(a)(2).

tions of discrimination in employment. *Simon* v. *St. Louis County, supra; Carmi* v. *Metropolitan St. Louis Sewer District, supra.* Indeed, the language in Section 604 is facially directed to circumstances of alleged discrimination in employment.

Here, appellant is not trying to get a job. She alleges discrimination in the provision of educational services. In these circumstances, Section 604 does not apply and appellant's standing is unaffected by the Title VI requirement that an aim of the federal funding must be to provide employment.

(B) The Education Act

Appellees do not dispute that the Education Act for All Handicapped Children provides a private cause of action in federal court. *See* 20 U.S.C. § 1415(e)(2). The contested issue with respect to the Education Act is the availability of damages, hereinafter discussed.

(C) Section 1983

The availability of a remedy under § 1983 presents a more difficult question. The district court concluded that discrimination on the basis of handicaps is made illegal by Section 504, not by the Constitution. Accordingly, the court concluded that appellant failed to state a § 1983 claim for two reasons: a statutory violation was insufficient to support a claim under § 1983, and invidious discrimination in violation of the equal protection clause of the Constitution has not been alleged.

The opinion in *Maine* v. *Thiboutot,* 448 U.S. 1 (1980), not available when the district court made its determination, renders this analysis inadequate. In that case, the Supreme Court held that § 1983 encompassed a claim based purely on statutory violations of federal social security statutes. 448 U.S. at 4-6. The Court expressly stated that § 1983 is not limited to violations of civil rights or equal protection laws. *Id.* at 6-8. Under

the reasoning of *Thiboutot*, § 1983 arguably provides a remedy[4] for violations of the Rehabilitation Act or the Education for all Handicapped Children Act, or both.

The difficult question here is whether either of two exceptions to the *Thiboutot* doctrine apply. A § 1983 cause of action does not lie (1) where Congress has foreclosed a § 1983 remedy through sufficiently comprehensive remedial devices in the underlying act, and (2) where the statute at issue does not create "rights, privileges, or immunities" within the meaning of § 1983. *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 101 S. Ct. 2615, 2626 (1981); *Pennhurst State School & Hospital* v. *Halderman*, 101 S. Ct. 1531, 1545-46 (1981).

The parties and the district court have been afforded no opportunity to address these complex and important exceptions. Case law is divided on the availability of § 1983 as a remedy for violations of the Education Act and Rehabilitation Act. *Anderson* v. *Thompson*, No. 80-2364, slip op. at 18-22 (7th Cir. Sept. 8, 1981) (§ 1983 does not provide remedy for claims under EAHCA); *Pushkin* v. *Regents of the University of Colorado*,

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[4] Section 1983 is remedial in nature, and does not in itself provide for any rights, substantive or otherwise. *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600 (1979). Section 1983 merely "ensure[s] that an individual ha[s] a cause of action for violations of the Constitution," *id.* at 617, and "authorizes a cause of action based on the deprivation of civil rights guaranteed by other acts of Congress." *Id.* at 618. While *Thiboutot* makes explicit that a § 1983 cause of action extends to cover statutory violations, this ruling does not change the fact that § 1983 itself creates no substantive rights. A § 1983 claim presumably must fail if the underlying statute does not create substantive rights. *See Pennhurst State School & Hospital* v. *Halderman, supra*, 101 S. Ct. 1531 (Developmentally Disabled Assistance and Bill of Rights Act did not in § 111 create substantive rights).

supra, No. 81-1224, slip op. at 17 (10th Cir. Sept. 4, 1981) (§ 1983 provides remedy for violation of § 504 without exhaustion of administrative remedies); *Tatro* v. *Texas,* 516 F. Supp. 968, 984 (N.D. Tex. 1981) (§ 1983 provides remedy under EAHCA provided administrative remedies are exhausted); *McGowan* v. *Hahn,* No. 78-C-4233 (N.D. Ill. July 27, 1981) (§ 1983 provides remedy for violation of § 504); *Medley* v. *Ginsberg,* 492 F. Supp. 1294, 1305 (S.D. W.Va. 1980) (plaintiffs may state § 1983 claim based on the Rehabilitation Act or Education Act); *Boxall* v. *Sequoia Union High School District,* 464 F. Supp. 1104, 1113 (N.D. Cal. 1979) (damages under § 1983 are available to enforce federal statutory rights guaranteed by the EAHCA); *cf. Romeo* v. *Youngberg,* 644 F.2d 147, 170 (3d Cir. 1980) (en banc) (§ 1983 may provide a remedy for statutory claims grounded in the Developmentally Disabled Assistance and Bill of Rights Act), *cert. granted,* 101 S. Ct. 2313 (1981). The authority of these cases is also subject to the limitation that several were decided after *Thiboutot,* but prior to *Pennhurst* and *Middlesex, supra,* in which the Supreme Court recognized limitations on the *Thiboutot* doctrine.

Remand is also indicated because appellant's complaint is unclear in two respects. The complaint does not unequivocally disclose whether damages are sought pursuant to § 1983. Counts II and III, which were interpreted by the district court as asserting claims under § 1983, contain prayers for injunctive relief. One conclusion which could be drawn is that appellant relies upon § 1983 only for injunctive relief, which is now a moot issue.

More important, appellant's prayer for relief includes a request for $50,000.00 for "depriv[ation] . . . of the equal protection of the laws and . . . of . . . civil . . . and constitutional rights; $474,358.00 for "violation of . . . statutory and civil rights in denying plaintiff her rights to a full and adequate education"; $15,000.00 "for . . . personal injuries"; and com-

pensatory relief in the form of additional education. This pleading does not make clear whether the damages requested for alleged statutory violations are coextensive with the damages sought pursuant to § 1983. If appellant intends to utilize § 1983 to recover damages not obtainable pursuant to the underlying statutes, our analysis would be affected by the apparent inconsistency of § 1983 and statutory remedies.

In sum, we remand for the district court's consideration of (1) the question whether appellant seeks damages, as opposed to injunctive relief, pursuant to § 1983; (2) the question whether, if appellant seeks monetary damages pursuant to § 1983, such damages are coextensive with those sought pursuant to the underlying statutes; (3) the question whether the exclusivity exception to the *Thiboutot* doctrine applies;[7] (4) the question whether the rights guaranteed by the underlying statutes are "rights secured by the laws of the United States" within the meaning of § 1983. On remand appellant may also wish to consider the extent to which her case is advanced by claim of a § 1983 cause of action, given our rulings as to availability of damages.

II. DAMAGES

Having concluded that a cause of action exists under both the Education Act and the Rehabilitation Act, we are faced with the issue of available relief. Despite the existence of a cause of action, appellant's complaint is subject to dismissal under Fed. R. Civ. P. 12 unless it can be determined that the damage relief she seeks is appropriate. *Davis* v. *Passman, supra,* 442 U.S. at 244.

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[7] One aspect of this inquiry is whether exhaustion of administrative remedies can save appellant from a ruling that the statutory remedies are exclusive. *See Tatro* v. *Texas, supra,* 516 F. Supp. at 968 (holding that the Education Act does not foreclose a § 1983 suit provided administrative remedies are exhausted).

(A) Section 504

Appellant's right to damage relief under § 504 is an open question in this and other circuits. *Pushkin* v. *Regents of the University of Colorado, supra,* No. 81-1224, slip op. at 2 & n.2 (10th Cir. Sept. 4, 1981); *Camenisch* v. *University of Texas, supra,* 616 F.2d at 132 n.10.

The starting point for our analysis is the principle enunciated by the Supreme Court in *Bell* v. *Hood,* 327 U.S. 678, 684 (1946), that where legal rights are invaded and a federal statute provides a right to sue for such invasion, federal courts may use any available remedy to make good the wrong. The existence of a statutory right implies the existence of all necessary and appropriate remedies. *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229, 239 (1969). Moreover, the right to seek money damages for civil rights violations is an accepted feature of the American judicial system. *Patton* v. *Dumpson,* 498 F.Supp. 933, 937 (S.D.N.Y. 1980) (holding damages are available under § 504).

Without reference to these general principles, however, at least one court has held that the existence of an elaborate administrative structure for *governmental* enforcement of § 504 precludes a finding that Congress intended to provide a "whole panoply of new rights and remedies" for individuals. *Boxall* v. *Sequoia Union High School District, supra,* 464 F. Supp. at 1112. This argument must be accorded some weight in light of Supreme Court cases stating that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 19 (1979) (and citations therein).

The facts in *Transamerica,* however, serve by contrast to highlight here the lack of statutory remedies such as can make the individual plaintiff whole. In *Transamerica,* a rescission remedy was expressly provided by statute, and federal courts

had implied a cause of action for restitution and injunctive relief under the Investment Advisors Act of 1940. *Id.* Criminal penalties and administrative sanctions were also expressly authorized. *Id.* at 20. In those circumstances, the Court found that Congress harbored no intention of providing an additional damage remedy. *Id.* at 21.

However, the administrative enforcement remedies provided under the Rehabilitation Act are of little comfort to the individual plaintiff. The regulations adopted by the Department of Health and Human Services (HHS), incorporating procedures applicable to Title VI of the 1964 Civil Rights Act, 45 C.F.R. § 84.61; 45 C.F.R. § 80.6-81.10 (1981), provide administrative sanctions such as the termination of funds for acts of discrimination. 45 C.F.R. § 80.8. No provision is made for the complainant to furnish evidence or otherwise participate in the agency investigation. 45 C.F.R. § 80.7(c). The complainant has no right to object to, or seek administrative review of, HHS's findings. 45 C.F.R. § 80.7(d)(2). There is no provision for HHS to issue a binding order that damages be paid to an individual who has been injured by reason of a violation of § 504.

It is obvious that administrative remedies are inadequate to vindicate individual rights and that Congress could not have expected the individual plaintiff to be made whole through administrative procedures. Indeed, there is support for a damage remedy to be found in the legislative history of 1978 amendments to the Rehabilitation Act. The House-Senate Conference Committee eliminated a prohibition against money damages which had been proposed regarding vocational rehabilitation programs under the Act. H.R. Rep. 95-1780, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code, Cong. & Ad. News 7375, 7379.

We indulge the presumption of *Bell* v. *Hood, supra,* that a wrong must find a remedy, and in light of the inadequacy of administrative remedies, conclude that damages are awardable

under § 504.[8] *Campbell* v. *Talladega County Board of Education*, 518 F. Supp. 47, 56-7 & n.13 (N.D. Ala. 1981) (damages awardable but barred by impossibility of measurement and by eleventh amendment); *Patton* v. *Dumpson, supra*, 498 F. Supp. at 937-39; *Poole* v. *South Plainfield Board of Education*, 490 F. Supp. 948, 949 (D. N.J. 1980); *but see Boxall* v. *Sequoia Union High School District, supra*, 464 F. Supp. at 1111-12 (relying on analogy to Title VI of the Civil Rights Act of 1964).[9]

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[8] We assume *arguendo*, without deciding, that *Transamerica* may shift to the party proposing the remedy the burden of proving that Congress intended the requested relief in addition to the express provision of other statutory remedies. *See also Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 419 (1975), *citing Nat'l Railroad Passenger Corp.* v. *Nat'l Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974); *Lieberman* v. *Univ. of Chicago, supra*, No. 80-2549, slip op. at 3 n.4, 16 (7th Cir. Sept. 23, 1981) (noting some inconsistency of *Bell* v. *Hood* and *Transamerica*). Here, we find that appellant can discharge that burden.

[9] In reaching this conclusion, we have examined the issue of damages in the closely analogous contexts of Title VI and Title IX. HHS's final regulations implementing § 504, *see* 45 C.F.R. § 84.61 (1981), adopt the same procedures as are used to enforce Title VI and 20 U.S.C. § 1681 as part of Title IX. *See* 45 C.F.R. § 36.71 (1979).

The analogy to these statutes is of little help because judicial thought as to damages under Title IX and Title VI is divided. *E.g.*, *Lieberman* v. *University of Chicago, supra*, No. 80-2459 (7th Cir. Sept. 23, 1981) (Title IX); *Guardians Ass'n of New York City* v. *Civil Serv. Comm'n*, 633 F.2d 232 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 3083 (1981) (Title VI). The diversity of views expressed in these cases convinces us that we cannot resolve the damage issue by analogy to sister statutes. *Cf. Valentine* v. *Smith*, 654 F.2d 503, 512 (8th Cir. 1981); *Chambers* v. *Omaha Public School Dist.*, 536 F.2d 222, 225 n.2 (8th Cir. 1976) (issue of damages under Title VI is not resolved in this circuit).

Since administrative remedies are of little avail to the individual plaintiff, we also conclude that § 504 suits appropriately may be maintained in advance of the exhaustion of administrative remedies.[10]

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[10] Case law is divided on the issue of exhaustion as a prerequisite to a § 504 suit.

Must exhaust: *Groshong* v. *Independent School Dist.*, Civ. No. 3-77-376 (D. Minn. Nov. 13, 1980); *Stubbs* v. *Kline*, 463 F. Supp. 110, 117 (W. D. Pa. 1978); *Doe* v. *New York Univ.*, 442 F. Supp. 522 (S.D. N.Y. 1978); *Crawford* v. *Univ. of North Carolina*, 440 F. Supp. 1047, 1058 (M.D. N.C. 1977); *NAACP* v. *Wilmington Medical Center*, 426 F. Supp. 919 (D. Del. 1977).

Exhaustion rejected: *Pushkin* v. *Regents of the Univ. of Colorado, supra*, No. 81-1224, slip op. at 16 (10th Cir. Sept. 4, 1981); *Kling* v. *County of Los Angeles*, 633 F.2d 876, 879 (9th Cir. 1980); *Camenisch* v. *Univ. of Texas*, 616 F.2d 127, 133-36 (5th Cir. 1980);, *vacated on other grounds*, 101 S. Ct. 1830 (1981); *Riley* v. *Ambach*, 508 F. Supp. 1222, 1234-35 (E.D. N.Y. 1980); *Lestrange* v. *Consolidated Rail Corp.*, 501 F. Supp. 964, 969 (M.D. Pa. 1980); *Patton* v. *Dumpson*, 498 F. Supp. 933, 939-41 (S.D. N.Y. 1980); *Medley* v. *Ginsberg*, 492 F. Supp. 1294, 1305-07 (S.D. W.Va. 1980); *Whitaker* v. *Bd. of High Educ.*, 461 F. Supp. 99, 106-09 (E.D. N.Y. 1978); *Michigan Paralyzed Veterans* v. *Coleman*, 451 F. Supp. 7 (E.D. Mich. 1977).

See also Cannon v. *Univ. of Chicago, supra*, 441 U. S. at 706 n.41 (individual suits are appropriate in advance of exhaustion in the analogous context of Title IX); *Rosado* v. *Wyman*, 397 U. S. 397, 406 (1970) (principle of exhaustion of administrative remedies and doctrine of primary jurisdiction are not applicable where petitioners do not seek review of administrative ruling and could not participate in HEW review). Several courts have found *Cannon* dispositive as to exhaustion under § 504. *Pushkin* v. *Regents of the Univ. of Colorado, supra*, No. 81-1224, slip op. at 16; *Kling* v. *County of Los Angeles, supra*, 633 F.2d at 879. We are swayed by the fact that HEW has argued as amicus curiae that exhaustion should not be required as a prerequisite to private litigation under § 504. *Patton* v. *Dumpson, supra*, 498 F. Supp. at 939.

We caution that our ruling that plaintiff may proceed with her damage action under § 504 of the Rehabilitation Act is limited in two respects. First, the eleventh amendment bars the recovery of damages against certain defendants, as indicated below. Second, as to those defendants who remain in the case, we expressly reserve judgment as to whether the nature of the discrimination asserted by appellant will support a § 504 recovery. It is unclear whether defendants' treatment of Terri Ann is alleged to be discriminatory when compared with the treatment of other handicapped children, when compared with the treatment of non-handicapped children, or when measured by the obligations imposed by the Education Act.

At this stage of the case, we hold only that damages are available under § 504 as a necessary remedy for discrimination against an otherwise qualified handicapped individual. Appellant's complaint gave adequate notice to defendants that they were charged with discriminatory denial of equal access to educational facilities, in violation of § 504.

(B) The Education Act

Damages are available under the Education Act if Congress intended to provide for such relief when authorizing "such relief as the [district] court determines is appropriate." 20 U.S.C. § 1415(e)(3). We have previously been spared the necessity of deciding whether "appropriate relief" includes damages. *Monahan* v. *Nebraska*, 645 F.2d 592, 598 n.9 (8th Cir. 1981). We now join the Seventh Circuit in holding it does not. *Anderson* v. *Thompson*, 658 F.2d 1205 (7th Cir. 1981).

Although some courts have assessed the availability of damages under a *Cort* v. *Ash* analysis, *e.g.*, *Loughran* v. *Flanders*, 470 F. Supp. 110 (D. Conn. 1979), we eschew this approach in favor of the narrower focus adopted in *Anderson*, *supra*. Congress has expressly created a cause of action in Section 615 of the Act and has empowered the district court to

grant "such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). Accordingly, the question is simply whether damages are within the relief foreseen by Congress.

The reasoning and research of the Seventh Circuit on this point is conclusive in our view. As that court points out, Section 615 is entitled "Procedural Safeguards." The provision for suit in district court caps an entire sequence of procedures aimed at ensuring proper placements and programs for handicapped children. *Anderson* v. *Thompson, supra,* 658 F.2d at 1210-11. This context makes it clear that "appropriate" relief was generally intended to be restricted to injunctive relief, within which the district judge would have wide latitude to fashion an individualized educational program for the child. *Id.* at 1211.

The legislative history of the Education Act, like the language of the statute itself, provides little support for a damage remedy. This history has been amply set forth by the Seventh Circuit, and we find it unnecessary to restate it here. *Id.* at 1211-13. After careful independent review, we conclude that a damage remedy was not generally intended.

We depart from the Seventh Circuit's analysis, however, insofar as that court in dictum recognized two exceptional circumstances in which a limited damage award might be appropriate. These circumstances were, first, where there was a risk to the child's physical health in the program offered by the school system, and second, where the defendant acted in bad faith by failing to comply with the procedural provisions of Section 615 in an egregious fashion. *Id.* at 1213-14. *Cf. Monahan* v. *Nebraska,* 491 F.Supp. 1074, 1094 (D. neb. 1980) (tuition reimbursement available in circumstances of defendant's failure to comply with Act's procedural requirements), *aff'd in part, vacated in part,* 645 F.2d 592 (8th Cir. 1981); *Boxall* v. *Sequoia Union High School District, supra,* 464 F. Supp. at 1112 (reim-

busement for private tutor available); *Tatro* v. *Texas, supra,* 516 F. Supp. at 977-80 (tuition reimbursement available where child could not be enrolled in defendant's facilities without risk of injury).

These cases reach a result which claims our sympathies, and which may be appropriate in special circumstances. But in the present case, nothing in the record suggests that appellant bases her claim to damages on exceptional circumstances like any of those in the cited cases. Moreover, as applied to the case at bar, the rationale of the cited cases relies on legislative history which we regard as insufficient to support a general right of recovery. While Congress might well have wished to provide a right of action for dmaages in some exceptional circumstances, we entertain serious doubt that the statute itself contains warrant for a general right, and, as indicated, we find no right to damages here.

III. ELEVENTH AMENDMENT

Appellant's right to damage relief is further limited by the eleventh amendment. The district court dismissed appellant's prayer for compensatory educational services on eleventh amendment grounds. Although the court's ruling pertained only to this aspect of the relief requested, eleventh amendment immunity partakes sufficiently of a jurisdictional bar, *Edelman* v. *Jordan,* 415 U. S. 651, 677-78 (1974), that we consider its application to all defendants and claims in this case.

A. Qualification as a "State"

The preliminary question in our eleventh amendment analysis is whether various defendants share the state's immunity. The ability of a defendant to partake of the state's eleventh amendment immunity depends, at least in part, on the nature of the entity created by state law. *Mount Healthy City School District*

Board of Education v. *Doyle,* 429 U. S. 274, 280 (1977). Controlling case law holds that a county, as well as the school board of such a political subdivision, does not occupy the same position as a state for eleventh amendment purposes. *Id.; Edelman* v. *Jordan, supra,* 415 U. S. at 667 n.12. The eleventh amendment therefore does not preclude the award of damages against the Special School District of St. Louis County, the Board of Education of the Special School District, or officials of the Special School District who are sued in their official capacity.

The Missouri Department of Elementary and Secondary Education and the Missouri Department of Mental Health stand on different footing. In determining whether a state agency or department shares the state's eleventh amendment shield, the key is who will pay for any judgment rendered in favor of appellant. *Edelman* v. *Jordan, supra,* 415 U. S. at 664-65; *Jackson Sawmill Co.* v. *United States,* 580 F.2d 302, 308-09 (8th Cir. 1978), *cert. denied,* 439 U. S. 1070 (1979).

Under the Omnibus State Reorganization Act of 1974, the Missouri Department of Elementary and Secondary Education and Missouri Department of Mental Health were created as wings of the executive branch of state government. Laws 1973, 1st Ex. Sess., p.530, S.B. No. 1 As Amended; 3A Mo. Ann. Stat., Appendix B (Vernon's) (Supp. 1981). Appellant does not contest that any judgments against these departments would be paid from the state treasury.

The immunity of these two departments of the State extends to entities within the departments. Section 9(5) of the Omnibus State Reorganization Act of 1974, *supra,* 3A Mo. Ann. Stat., App. B (Vernon's) (Supp. 1981), establishes within the Department of Mental Health a Division of Mental Retardation and Developmental Disabilities. The director of the division administers various state facilities, including the "St. Louis State School Hospital." Assuming that this is the same facility as the

"St. Louis State Hospital" referred to in appellant's complaint, the Hospital and its Youth Center must obviously share the cloak of immunity which pertains to the Department of Mental Health. Appellant's complaint in Count III asserts that various defendants *"acting under the authority of the State of Missouri,* supervise, manage and maintain a Youth Center and State Hospital for the mentally imcompetent." (Emphasis added.)

The State Board of Education is similarly within the State Department of Elementary and Secondary Education, and shares its immunity. Section 5 of the Omnibus State Reorganization Act of 1974, *supra,* 3A Mo. Ann. Stat., App. B. (Vernon's) (Supp. 1981); 11 Mo. Ann Stat. § 161.012 (Vernon's) (1959).

A similar analysis applies to officials of these departments sued in their official capacity. To impute liability to these officials is not to impugn any particular officeholder, but rather the office itself. *Nevels* v. *Hanlon,* 656 F.2d 372, 377 n.7 (8th Cir. 1981), quoting *Arthur* v. *Nyquist,* 573 F.2d 132 (2d Cir. 1978); *see also Edelman* v. *Jordan, supra,* 415 U. S. at 663; *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459, 463-64 (1945).

B. Waiver

Appellant argues in the alternative that such immunity as would ordinarily pertain has here been abrogated by Congress in passing the Education Act, and by the State of Missouri in accepting federal funds under the Act. Appellant correctly points out that Congress may abrogate such eleventh amendment immunity as would otherwise apply under § 5 of the fourteenth amendment. *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976).

Abrogation of the states' immunity, however, will not be found in the absence of express, formal abrogation or persuasive legislative history. *Quern* v. *Jordan,* 440 U. S. 332, 345

& n.16 (1979). Assuming *arguendo* that the Education Act was passed pursuant to the fourteenth amendment, an intent to sweep away the immunity of the states cannot be inferred from this fact alone. *Id.* at 345. Appellant offers and we have found no evidence in the legislative history that the Education Act was intended by Congress to abrogate the states' immunity.

In addition to arguing Congressional abrogation, appellant contends that the state waived its immunity by participating in a program of federal assistance. The argument of waiver by participation, however, has been rejected by the Supreme Court. *Florida Department of Health & Rehabilitative Services* v. *Florida Nursing Home Ass'n.*, 450 U. S. 147, 150 (1981); *Edelman* v. *Jordan, supra,* 415 U. S. at 673. Waiver of immunity by a state will be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Florida Department of Health & Rehabilitative Services, supra,* 450 U. S. at 150, quoting *Edelman* v. *Jordan, supra,* 415 U. S. at 673. Appellant's argument that defendants waived their eleventh amendment defense by filing a responsive pleading is also patently without merit. *Edelman* v. *Jordan, supra,* 415 U. S. at 677-78; *Ford Motor Co.* v. *Department of Treasury, supra,* 323 U. S. at 466-67.

(C) Compensatory Services.

Appellant's final argument for reaching the state defendants is that compensatory educational services, unlike the other damages sought, are prospective and equitable in nature. Prospective, equitable relief has long been recognized as an exception to eleventh amendment immunity. *Ex Parte Young,* 209 U. S. 123 (1908); *Edelman* v. *Jordan, supra,* 415 U. S. at 664, 667-68. Such relief may be granted even when attended by fiscal consequences to the state. *Id.* at 667.

Often, as is the case here, the line between prospective and retrospective relief may not be bright. *Id.* Appellant seeks such compensatory services from the state as are necessary "to overcome the effects of any wrongful denial of special educational services." The eleventh amendment bars such services if they are a form of retroactive compensation "measured in terms of a monetary loss resulting from a past breach of legal duty." *Edelman* v. *Jordan, supra,* 415 U. S. at 668; *Nevels* v. *Hanlon, supra,* 656 F.2d at 377. On the other hand, the eleventh amendment is no bar if the relief appellant seeks can fairly be characterized as "a necessaary consequence of compliance in the future with a substantive federal question determination." *Edelman* v. *Jordan, supra,* 415 U. S. at 668.

An award of tuition reimbursement would clearly be barred as an award of damages for past breach of legal duty under this test. *Riley* v. *Ambach,* 508 F. Supp. 1222, 1248 (E.D.N.Y. 1980). We view the request for compensatory services as practically indistinguishable from a request for such reimbursement. Compensatory services, like the award of a money judgment, would be measurable against past educational deprivation. The expenditure of state monies to provide compensatory services would not, in other words, ensure *"compliance in the future* with a substantive federal question determination." *Edelman* v. *Jordan, supra,* 415 U. S. at 668 (emphasis added). We conclude that the eleventh amendment bars the award of such compensatory relief as appellant has requested. *Cf. Campbell* v. *Talladega County Board of Education, supra,* 518 F. Supp. at 56 (awarding a free and appropriate public education for two years past age twenty-one against County Board of Education and State Board of Education, without consideration of eleventh amendment); *Henkin* v. *South Dakota Department of Social Services,* 498 F. Supp. 659, 667-68 (D. S.D. 1980) (holding in suit under Developmentally Disabled Assistance and Bill of Rights Act that eleventh amendment does not bar injunctive order requiring state to supply *future* payment to private facility in the amount of sum state would expend in in-state facility).

We affirm the dismissal on eleventh amendment grounds of all causes of action for damage relief asserted against the State of Missouri, its above-named departments and facilities, and officials of these departments sued in their official capacity.[11]

IV. MOTION TO AMEND

The final issue before us involves the district court's denial of appellant's motions to amend her complaint. On June 30, 1980, approximately nine months after initiating this action, appellant moved to amend her request for relief to include "such sums of money which have been expended from her resources which were not her obligation to pay, but were the obligation of the State of Missouri and its various departments and agencies." On September 11, 1980 she filed an additional motion to add her father Clyde J. Miener as a party plaintiff, asseting that Clyde J. Miener had authorized payments of insurance benefits for education-related services. These motions were made after the parties entered into a partial stipulation of settlement as to appellant's educational placement and after the district court had dismissed all claims for damages under the federal statutes and § 1983.

Since Fed. R. Civ. P. 15(a) provides that leave to amend shall be "freely given," we are always concerned with reasons for denial of proposed amendments. Defendants suggest one such

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[11]Defendants John Twiehaus, Acting Superintendent of the State Louis State Hospital, and Dr. Milton Fujita, former Medical Director of the Youth Center of the St. Louis State Hospital, are dismissed insofar as they are sued in their official capacities. The eleventh amendment does not prevent entry of an award of damages against these officials in their *individual* capacities, *Scheuer* v. *Rhodes*, 416 U. S. 232, 237-38 (1974). Given our revival of some of appellant's federal statutory causes of action, the district court may wish to reconsider the dismissal of the pendent state tort claim against these two defendants.

reason. They state that appellant withheld a known claim and asserted it only after coaxing defendants into settlement on the basis of stated claims.

This argument is facially appealing. It may be observed, however, that appellant's proposed amendments amounted to little more than an amplification of previously alleged claims but with an assertion of additional damages. Considering the late dates of the amendments, one may suspect that the district court refused to allow amendment in part because the court had already tentatively concluded, on grounds which we now reverse, that appellant had no cause of action for damages. In any case, given the limited nature of the amendments sought, it is urged that it was an abuse of discretion to refuse leave to amend. *Harkless* v. *Sweeny Independent School District*, 554 F.2d 1353, 1359 (5th Cir.), *cert. denied*, 434 U. S. 966 (1977); *R.E.B., Inc.* v. *Ralston Purina Co.*, 525 F.2d 749, 751-52 (10th Cir. 1975).

In light of proceedings subsequent to the action complained of and of the necessity of further proceedings on remand, we find it unnecessary to decide whether it was error to refuse leave to amend. We hold only that such refusal shall be considered as without prejudice to such future efforts to amend as may be appropriate on remand.

In sum, we affirm on eleventh amendment grounds the dismissal of all causes of action for damage relief and the request for compensatory services as asserted against the State of Missouri; the Missouri Department of Elementary and Secondary Education; the Missouri Department of Mental Health; the St. Louis State School Hospital and its Youth Center; the Missouri State Board of Education; and officials of these entities who are sued in their official capacity.

Our dismissal on eleventh amendment grounds of defendants Twiehaus and Fujita is limited to claims asserted against these defendants in their official capacity. Insofar as appellant asserts

a cause of action under the Rehabilitation Act against these officials in their individual capacity, and insofar as the district court may permit appellant to revive against these defendants individually her pendent state claim, the eleventh amendment presents no bar.

We similarly conclude that as to the Special School District of St. Louis County, its Board of Education, and its officials, the eleventh amendment presents no bar to damage relief. We accordingly reverse the dismissal of appellant's cause of action for damages under the Rehabilitation Act against these defendants.

We also reverse the dismissal of appellant's § 1983 cause of action as asserted against the various Special School District defendants. This claim is remanded for the district court's reconsideration in light of *Thiboutot* and in light of the questions enumerated in our discussion.

We affirm the district court's dismissal of appellant's claim to damages under the Education Act on the ground that the Act does not provide a general cause of action for damages.

Finally, we affirm as without prejudice the district court's denial of leave to amend and hold that appellant may seek to amend her complaint to assert additional damages and to add Clyde Miener as a party plaintiff, insofar as these amendments pertain to the causes of action and defendants who remain in the case. Appellant may otherwise be permitted to amend as justice may require.

A true copy.

Attest:

CLERK, U S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
September Term, 1981

No. 80-1971

Terri Ann Miener, etc., et al.,
Appellants,

v.

State of Missouri, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Petition of appellees for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same, be, and it is hereby, denied.

May 20, 1982

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79 - 1050 C (2)

Terri Ann Miener, etc.,
Plaintiff,

vs.

State of Missouri, et al.,
Defendants.

ORDER

(Filed January 25, 1980)

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that defendants' motion to dismiss be and is granted in part and denied in part.

IT IS FURTHER ORDERED that plaintiff's prayers for damages as to Counts I, II, and III be and are dismissed.

IT IS FURTHER ORDERED that Counts II and III, to the extent that they purport to state claims pursuant to 42 U.S.C. §1983 be and are dismissed.

/s/ John F. Nangle
UNITED STATES DISTRICT
JUDGE

Dated: January 25, 1980.

MEMORANDUM

This case is now before the Court on motions to dismiss of various defendants. This case arises out of the tragic circumstances of a young girl's serious physical and emotional handicaps and her concerned father's attempts to obtain satisfactory treatment and education. Plaintiff seeks monetary, injunctive and declaratory relief due to defendants' alleged violations of the Education of the Handicapped Act, 20 U.S.C. §1401 et seq., Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. §794, and the Civil Rights Act, 42 U.S.C. §1983. Plaintiff also seeks damages for the allegedly tortious conduct of two defendants.

Named as defendants are numerous individuals and political bodies and agencies: the State of Missouri and its Chief Executive Officer, Governor Joseph Teasdale; the Missouri Department of Elementary and Secondary Education, and its Commissioner, Arthur Mallory, and Assistant Commissioner, Dr. Leonard Hall; the Missouri Department of Mental Health, its acting Director, Dr. Beverly Wilson, and the Chairman of the State Mental Health Commission, Norman Tice; the acting Superintendent of the St. Louis State Hospital, John Twiehaus, and the former Medical Director of the Youth Center at that Hospital, Dr. Milton Fujita; and the Special School District of St. Louis County, Missouri, its Board of Education, its Directors, Allan Barclay, Gerald Braznell, and Gerald Hansen, and its Superintendent of Schools, Thomas Smith.

This suit was initially filed on August 27, 1979, and a preliminary injunction was requested. The complaint alleged that plaintiff, a seventeen year old girl, was then a voluntary resident of the Youth Center of the St. Louis State Hospital, suffering from serious physical and emotional disorders. The complaint further alleged that defendants were discriminating against plaintiff because of those disorders, in violation of Section 504 and 42 U.S.C. §1983, and failing to provide plaintiff

with a free, appropriate public education, in violation of the Education of the Handicapped Act. A pendant state claim was also alleged, claiming that defendants Twiehaus and Fujita had failed in their duty to provide a reasonably safe environment for the residents at the Youth Center, resulting in frequent physical attacks upon plaintiff by residents and staff at the Center.

It has been clear from the outset that plaintiff's father's primary concern has been to ensure that plaintiff is provided adequate treatment, education, and care. To this end, a mandatory preliminary injunction was requested which would direct the defendants to place plaintiff in the Brown School in Austin, Texas, and pay for her care there pending the outcome of this litigation. Plaintiff alleged that the Brown School was an adequate facility which had agreed to accept her as a patient, and that there were no such facilities in the State of Missouri.

This Court met with the parties on October 18, 1979. At that time it was decided that a hearing on the merits would be postponed in order to allow plaintiff to pursue the administrative remedies set out in the Education of the Handicapped Act, its accompanying regulations, and the state legislation implementing the Act. 20 U.S.C. §1401 et seq.; 45 CFR §121a.1 et seq.; and §162.945 et seq., R.S.Mo. (1979). This Court indicated that, if plaintiff was not satisfied that she was being offered an appropriate educational plan after the exhaustion of these administrative procedures, an appeal would lie to this Court pursuant to 20 U.S.C. §1415(e)(2). At that time, a preliminary injunction was deemed unnecessary because all indications were to the effect that the impetus of litigation had caused defendants to vigorously protect plaintiff's welfare.

Since that time, the parties have been before this Court on several occasions to report on the progress of the administrative process. On December 31, 1979, this Court entered an order directing that, pending the final outcome of the administrative process, the Individual Education Plan developed by the State

Hospital and Special School District personnel be implemented. Costs of this plan were to be paid on an interim basis, with a determination of ultimate responsibility to be made in the future.

It is now appropriate to deal with the numerous motions to dismiss which have been filed by the various defendants in this case. Two grounds raised by defendants will not be dealt with at this time: plaintiff's failure to exhaust administrative remedies under the Education of the Handicapped Act and the relative responsibilities of the various school districts involved. The former is moot in light of plaintiff's current utilization of the administrative process; the latter will be dealt with upon the filing of subsequent motions for summary judgment specifically addressed to this issue.

Defendants have raised numerous grounds for dismissal of portions of this lawsuit, but several key issues immediately stand out, and the resolution of these issues moots many of the remaining arguments. Plaintiff claims in Counts II and III that she has been discriminated against due to her handicapped condition with respect to access to public education and treatment. These counts raise the issues of whether Section 504 may be utilized to support a private right of action for equitable relief and damages, and, if so, whether plaintiff must first exhaust her administrative remedies.

Section 504 provides, in pertinent part, as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...

The Department of Health, Education and Welfare promulgated regulations, in effect during the times relevant to this

litigation, which implemented this statutory prohibition of discrimination against the handicapped. See 45 CFR Part 84. An enforcement scheme was set up which coincided with the enforcement provisions of Title VI of the Civil Rights Act of 1964 ("Title VI"). 42 U.S.C. §2000d et seq; 45 CFR §§80.6 through 80.11 and 45 CFR Part 81; 45 CFR §84.61. This scheme of enforcement was undoubtedly prompted by the Congressional intent that enforcement of Section 504 would be through means similar to those employed in the implementation of Title VI. *N.A.A.C.P.* v. *Medical Ctr., Inc.*, 599 F.2d 1247, 1258 (3rd Cir. 1979).

Prior to the adoption of these regulations, it was generally held that Section 504 could be enforced through a private cause of action. *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977); *United Handicapped Federation* v. *Andre*, 558 F.2d 413 (8th Cir. 1977); *Davis* v. *Southeastern Comm. College*, 574 F.2d 1158 (4th Cir.), rev'd on other grounds ____ U.S. ____, 99 S.Ct. 2361 (1979). The Supreme Court found it unnecessary to rule on this issue in the only case involving Section 504 which has come before it. See, *Davis, supra*, slip op. at 5 n.5.

The adoption of implementing regulations has cast doubt upon these holdings, however. In *Lloyd*, the court stated that, once procedural enforcement regulations were issued to implement Section 504, the private cause of action should be limited to judicial review of this administrative process. *Lloyd, supra* at 1286 n.29. See, also *Davis*, 574 F.2d at 1163 n.9. The cases which arose subsequent to the issuance of these regulations are not in agreement as to whether a private right of action still exists at all, and, if so, whether administrative remedies must first be exhausted. *N.A.A.C.P., supra; Whitaker* v. *Board of Higher Ed. of City of New York*, 461 F.Supp. 99 (E.D.N.Y. 1978). Cf. *Sherer* v. *Waier*, 457 F.Supp. 1039 (W.D.Mo. 1977); *Crawford* v. *University of North Carolina*, 440 F.Supp. 1047 (M.D.N.C.

1977); *Doe* v. *New York University,* 442 F.Supp. 522 (S.D.N.Y. 1978); *Doe* v. *Calautti,* 454 F.Supp. 621 (E.D. Pa.), aff'd 592 F.2d 704 (3rd Cir. 1979).

This Court must conclude that as far as suits to enforce Section 504 are concerned, as opposed to suits seeking damages for alleged violations of that section, a private right of action exists without regard to prior resort to administrative remedies.

The Supreme Court recently dealt with a similar issue in *Cannon* v. *University of Chicago,* ___ U.S. ___, 99 S.Ct. 1946 (1979), in which Title IX of the Education Amendments of 1972 ("Title IX"), §1681 et seq., was involved. In its analysis of the issue, the Supreme Court began with the premise that Title IX was intended by Congress to be interpreted and enforced in the same manner as Title VI. In this respect, Title IX is directly analogous to Section 504, *N.A.A.C.P., supra,* and this Court must conclude, therefore, that the decision in *Cannon* with respect to Title IX is directly applicable to the present issue concerning Section 504.

In *Cannon,* the Supreme Court held that, despite the absence of any express authoriziation in Title IX for the maintenance of a private cause of action to enforce that Title, such a cause of action should be implied. The Court also held that exhaustion of administrative remedies was not required prior to the institution of such a suit. *Cannon, supra,* slip op. at 27-29 n.41.

Title VI prohibits discrimination in federally funded programs on the basis of race, color or national origin; Section 504 extends this prohibition to discrimination on the basis of handicaps; Title IX prohibits discrimination on the basis of sex in federally funded educational programs. Complaints under all three statutes are administratively handled through the same procedures and regulations. 45 CFR §§80.6 through 80.11; 45 CFR Part 81; 45 CFR §84.61; 45 CFR §86.71. This Court must therefore conclude that the implication of a private right of ac-

tion to enforce Title IX without prior resort to administrative procedures mandates a similar conclusion with respect to Section 504. *N.A.A.C.P., supra.* See, also *University of California Regents* v. *Bakke,* 438 U.S. 265, 418-421 (1978) (Opinion of Stevens, J.), in which four justices imply a similar result with respect to Title VI.

A more difficult question is posed with respect to private actions, such as this, which, in addition to seeking the enforcement of Section 504, also seek damages for its violation. Little guidance can be found in previous cases dealing with this Section, Title VI, or Title IX. Previous cases dealing with Section 504 have either excluded any mention of the implication of a private right of action for damages, *Lloyd, supra; Andre, supra,* or have specifically disclaimed any intent to decide that issue. *Davis,* 574 F.2d at 1162; *N.A.A.C.P., supra* at 1248 n. 1. Though a few cases have dealt with this issue in the context of Title VI, the law is equally unclear with respect to that statute. See, *Bakke, supra* at 419 n.25 (Opinion of Stevens, J.); *Chambers* v. *Omaha Public School District,* 536 F.2d 222, 225 n.2 (8th Cir. 1976). Compare *Gilliam* v. *City of Omaha,* 388 F.Supp. 842 (D.Neb. 1975); *Flanagan* v. *President & Directors of Georgetown Col.,* 417 F.Supp. 377 (D.C.D.C. 1976), with *Rendon* v. *Utah State Dept. of Emp. Sec., Etc.,* 454 F.Supp. 534 (D.Utah 1978). Similarly, in *Cannon* the plaintiff's claim for damages for violation of Title IX was dismissed by the District Court, 406 F.Supp. 1257, 1259, but there is no indication that the Supreme Court dealt with this issue in its decision. ___ U.S. ___, 99 S.Ct. 1946 (1979).

The inquiry as to whether a private cause of action should be implied under Section 504 is guided by the factors enunciated in *Cort* v. *Ash,* 422 U.S. 66 (1975): 1) whether the statute was enacted for the benefit of a special class of which plaintiff is a member, 2) whether there is any indication of legislative intent to create a private remedy, 3) whether implication of such a remedy is consistent with the legislative scheme, and 4) whether

implying a federal remedy is inappropriate because the subject matter involves an area basically the concern of the States. Though all four factors are relevant, the second and third factors are clearly the most important. *Cannon, supra.* An analysis of these factors in the present context leads to the conclusion that plaintiff may not assert a cause of action for damages under Section 504.

Undoubtedly, Section 504 was enacted for the benefit of a special class of persons of which plaintiff is a member. Similarly, protection from discrimination is not an area of primary concern to the States.

> The right of participants in federally funded programs to be free from unlawful discrimination on account of race or handicap, is preeminently the province of federal, not state, law.

N.A.A.C.P., supra at 1252.

Nowhere in the legislative history of Section 504, however, is there the slightest indication that this Section might be the basis of a private damage suit. As previously mentioned, the legislative history shows an intent that the Section be enforced in the same manner as Title VI, and there is no authoritative decision allowing such damage suits under Title VI. Though there are passages in the legislative history referring to private enforcement suits, there is no such reference to damage suits, an incongruous circumstance if such suits were actually contemplated.

The implication of such damage suits would also be inconsistent with the legislative scheme. Through private enforcement suits individuals are able to vindicate their personal rights. The power to enforce the statute's non-discriminatory mandate through fiscal pressures, however, is best left to the appropriate governmental agency, which is better able to determine whether an illegal discriminator deserves the cut-off of federal funds.

N.A.A.C.P., supra at 1255 n.27. Though in a private damage suit the plaintiff is attempting to recover for his own benefit, the fiscal effect upon the defendant in such suits might likely be the same as a cut-off of funds. A recipient of federal funds might well decide to forego such assistance when faced with the possibility of liabilities approaching or exceeding the funds received. If so, the recipient might then be free to discriminate against the handicapped, or blacks or women for that matter, and everyone loses.

This Court must therefore conclude that defendants' motion to dismiss with respect to plaintiff's claim for damages under Section 504 should be granted.

Plaintiff apparently is also proceeding under 42 U.S.C. §1983 in Counts II and III, pursuant to which a damage award is allowable. It is clear, however, that a cause of action under that statute is not stated. *Sherer* v. *Waier, supra.* As in *Sherer,* the facts as alleged in the complaint do not appear to involve any invidious discrimination against similarly situated individuals. What is involved are allegations of discrimination against plaintiff because of her handicaps. Such discrimination is made illegal by Section 504, not the constitution.

A similar conclusion must be reached with respect to plaintiff's claim for damages due to defendants' alleged violation of the Education of the Handicapped Act. That Act provides specific remedies for aggrieved students and parents, and the implication of an additional remedy is not warranted. *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453 (1974). There is nothing in the legislative history of the Act to indicate that Congress favored the implication of such a cause of action, and the implication of a private right of action for damages would interfere with efforts to supply appropriate and innovative education to the handicapped. *Loughran* v. *Flanders,* 470 F.Supp. 110 (D.Conn. 1979). This Court must agree with the decision in *Loughran* that

a private cause of action for damages should not be implied. Defendants' motion to dismiss the damage claims under the Education of the Handicapped Act will therefore be granted.

These rulings should dispose of defendants' remaining arguments. All defendnats are properly before this Court due to their necessary involvement in effecting any relief that may later be found necessary. *Welsch* v. *Likins,* 550 F.2d 1122 (8th Cir. 1977), and should not be dismissed from this suit due to an alleged lack of personal involvement in the events surrounding this controversy. Defendants' remaining claims are without merit.

/s/ John F. Nangle
UNITED STATES DISTRICT
JUDGE

Dated: January 25, 1980.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79 - 1050 C (2)

Terri Ann Miener, etc.,
Plaintiff,

vs.

State of Missouri, et al.,
Defendants.

ORDER

(Filed September 19, 1980)

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that defendants' motion to dismiss plaintiff's claim for compensatory education be and is granted and that such claim be and is dismissed.

IT IS FURTHER ORDERED that Count IV of plaintiff's complaint be and is dismissed without prejudice.

IT IS FURTHER ORDERED that the motion of defendant Special School District of St. Louis County, Missouri be and is denied as moot.

/s/ John F. Nangle
UNITED STATES DISTRICT
JUDGE

Dated: September 19, 1980.

ORDER

IT IS HEREBY ORDERED that plaintiff's motion for substitution of Joe J. Winters for Norman C. Tice as a party defendant be and is granted and that Norman C. Tice be and is dismissed as a party defendant herein.

IT IS FURTHER ORDERED that plaintiff's motion for substitution of Paul R. Ahr for Beverly Wilson as a party defendant be and is granted and that Beverly Wilson be and is dismissed as a party defendant herein.

IT IS FURTHER ORDERED that Clyde J. Miener be and is recognized as plaintiff's guardian and next friend herein.

IT IS FURTHER ORDERED that plaintiff's motion for the addition of the Missouri State Board of Education as a defendant be and is granted.

IT IS FURTHER ORDERED that plaintiff's motion to amend be and is denied.

/s/ John F. Nangle
UNITED STATES DISTRICT
JUDGE

Dated: September 19, 1980.

MEMORANDUM

This case is now before the Court on the motion of the state defendants to dismiss plaintiff's claim for "compensatory education." Plaintiff brought this suit seeking monetary, injunctive, and declaratory relief due to defendants' alleged violations of the Education of the Handicapped Act, 20 U.S.C. §1401 et seq., Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and the Civil Rights Act, 42 U.S.C. §1983. On January 25, 1980, this Court dismissed plaintiff's claim for damages for violation of the above acts, finding that private actions for damages were not allowable under the Education of the Handicapped Act or Section 504, and that plaintiff had not stated a claim under 42 U.S.C. §1983. This Court upheld plaintiff's claims, however, to the extent that she sought to enforce the education of the Handicapped Act and Section 504.

On April 23, 1980, the parties entered into a stipulation of partial settlement under which plaintiff agreed to dismiss with prejudice all claims not previously dismissed by this Court, except plaintiff's claim seeking compensatory education beyond the age of twenty-one and seeking damages for defendants' allegedly tortious conduct, a pendent state law claim. The issue now presented is whether the claim for compensatory education should also be dismissed, thereby disposing of all the federal claims.

The request for compensatory education is found in the third paragraph of plaintiff's prayer for relief.

> 3. Require Defendants to provide prospective relief in the form of compensatory services to overcome the effects of any past denial of special educational services as defined by the laws of the State of Missouri and by the laws of the United States as aforesaid. Such services can and should be

> provided at the Brown School is (sic) Austin, Texas, at no cost to the Plaintiff, Clyde J. Miener. It is respectfully submitted that the proper measure of the injury to Terri Ann because of the denial of a full opportunity to education is the cost of an educational program which can restore Terri Ann to the developmental level which she would have achieved by age twenty-one (21) if Defendants had fulfilled their obligation and duty to her. The State of Missouri and its Departments of Mental Health and Elementary and Secondary Education have failed to provide the proper levels of education for Plaintiff, Terri Ann, and therefore should be found liable to restore as best can be restored at this time, the educability and learning capacity of the Plaintiff, Terri Ann.

This Court can discern no reason to distinguish the above prayer from plaintiff's prayer for damages as far as recovery under the Education of the Handicapped Act and Section 504 are concerned. Damages are meant to compensate an injured party for a past injury. Though phrased in different terms, that is exactly what plaintiff seeks in the above prayer.

Though the above prayer is not exactly clear on this point, plaintiff's briefs with respect to the instant motion indicate that she seeks an injunction forcing the State to educate her past the age of twenty-one. Had plaintiff rather sought the funds necessary to obtain a private education, there can be no doubt that the claim would be one for "damages," and therefore barred by this Court's Order of January 25, 1980. This Court does not believe the instant prayer is significantly different.

That the prayer for "compensatory education" should be treated the same as one for damages is apparent from the context in which it arises. Injunctive relief is meant to prevent the violation of some duty in the future. Ordering defendants to comply with the Education of the Handicapped would be a relevant example. Damages, on the other hand, are meant to com-

pensate a party for a past violation of some duty. Awarding plaintiff money due to defendants' violation of the Education of the Handicapped Act is an example of "damages."

Plaintiff's claim for "compensatory education" clearly should be classified as "damages." She seeks such relief not to force defendants to comply with their duties under federal law in the future, for they would so comply by providing a free and appropriate public education for plaintiff until she reaches twenty-one, but rather to compensate her for the damage done to her by defendants' past shirking of their responsibilities. That plaintiff phrases her prayer for relief in equitable terms is not significant.

Edelman v. *Jordan*, 415 U.S. 651 (1974), dealt with an analogous situation. In that case, the lower courts had awarded plaintiffs a retroactive award of monetary relief as equitable restitution, due to defendants' earlier illegal denial of benefits to plaintiffs. The Supreme Court found such an award barred by the Eleventh Amendment, even though phrased in equitable terms.

In words pertinent to the instant case, the Supreme Court said, at 668:

> ... It (the District Court decree) requires payment of state funds, *not as a necessary consequence of compliance in the future* with a substantive federal-question determination, *but as a form of compensation* to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State. ... *It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.* (Emphasis added.)

As stated above, the same is true in this case. Plaintiff is seeking damages, even though not denominated as such. Plaintiff's prayer for compensatory education must therefore be dismissed in accordance with this Court's Order of January 25, 1980.

The only claim now remaining is the pendent state tort claim. The Supreme Court has said, in discussing the doctrine of pendent jurisdiction, that "[c]ertainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966). Though dismissal in the present situation is discretionary, *Kuhn* v. *Nat. Ass'n. of Letter Carriers, Branch 5*, 528 F.2d 767 (8th Cir. 1976), this Court believes that dismissal is warranted. Plaintiff's pendent state claim will therefore be dismissed without prejudice.

/s/ John F. Nangle
UNITED STATES DISTRICT
JUDGE

Dated: September 19, 1980.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 79 - 1050 - C (3)

Terri Ann Miener, by and through her next friend and parent, Clyde J. Miener,
Plaintiffs,

vs.

State of Missouri, and Joseph P. Teasdale, Governor; Department of Elementary and Secondary Education of the State of Missouri, Arthur L. Mallory, Commissioner of Education of the Department of Elementary and Secondary Education of the State of Missouri; Dr. Leonard Hall, Assistant Commissioner of Education, The Division of Special Education of the Department of Elementary and Secondary Education of the State of Missouri, The Special School District of St. Louis County Missouri: The Board of Education of the Special School District of St. Louis County, Missouri; Allan G. Barclay, Gerald K. Braznell, and Gerald B. Hansen, Directors of the Special School District of St. Louis County, Missouri; Mr. Thomas E. Smith, Superintendent of Schools of the Special School District of St. Louis County, Missouri; Department of Mental Health of the State of Missouri, Mr. Norman Tice, Commissioner of the Department of Mental Health of the State of Missouri; Dr. Beverly Wilson, Acting Director of the Department of Mental Health of the State of Missouri; Mr. John Twiehaus, individually and in his official capacity as the Acting Superintendent of the St. Louis State Hospital; Dr. Milton Fujita, individually and in his former official capacity as Medical Director of the Youth Center of the St. Louis State Hospital,
Defendants.

COMPLAINT

I.

Nature of Proceedings

1. This is a proceeding for declaratory judgment as to Plaintiffs' rights, for preliminary and permanent injunction enjoining Defendants from denying Plaintiffs their rights to equal protection under the laws, including the minor Plaintiff's right to a full education under the laws of the United States, for such affirmative relief and appropriate money damages to redress the past, present and future injuries inflicted upon Plaintiffs by Defendants, who have acted and continue to act in such manner as to deprive Plaintiffs of their civil and Constitutional rights, when Defendants knew, or reasonably should have known, that their actions, within their sphere of official responsibility, would violate the constitutional, civil and statutory rights of Plaintiffs.

2. Plaintiff, Terri Ann Miener suffers from behaviorial and emotional disorders and a dimished capacity to learn as a result of recurrent brain tumors. Terri Ann, as a handicapped child, is in need of special educational programs if she is to be trained and educated to the maximum of her ability. It is possible, with an immediate undertaking of a carefully designed program, to make Terri Ann a self-sustaining adult.

3. The State of Missouri and its various agencies has a responsibility under the Education of All Handicapped Children Act, the Rehabilitation Act, and the Constitution of the United States to provide Terri Ann with an education which treats her equally with other similarly situated persons and which provides her with a full educational opportunity.

4. The State of Missouri and its various agencies have failed to provide for Terri Ann's education needs and has denied her the equal protection of the laws. This suit is brought to remedy

this situation and assure that Plaintiff, Terri Ann Miener, receives the full measure of her rights under State and Federal law.

II.

Jurisdiction

5. The jurisdiction of this Court over this action is invoked under Title 42, United States Code, Section 1983, in that Plaintiffs are being deprived of their rights as secured by the Constitution of the United States of America, and particularly under: The Fifth and Fourteenth Amendments; or as secured by Title 29, United States Code, Section 794; Title 20, United States Code, Sections 1411-1420; such jurisdiction authorized under Title 28, United States Code, Sections 2201, 2204, 1331 and 1343(3) and (4). This Court has pendent jurisdiction over Plaintiffs' claims for relief and remedy from the personal injuries inflicted upon Terri Ann Miener while in the custody of the Missouri Department of Mental Health.

III.

The Parties

6. Plaintiff, Terri Ann Miener, born May 1, 1962, is a citizen of the United States, a resident of the St. Louis State Hospital, situated in the City of St. Louis in the State of Missouri, and a domiciliary of the County of St. Louis, State of Missouri.

7. Plaintiff's next friend and parent, Clyde J. Miener, is a citizen of the United States and a resident of the County of St. Louis in the State of Missouri.

8. Defendant, State of Missouri, is a body politic and a real party at interest, and Defendant Joseph Teasdale is the Governor of the State of Missouri and its Chief Executive Officer,

whose offices are located in Jefferson City, Cole County, Missouri.

9. Defendant, Department of Elementary and Secondary Education of the State of Missouri, is a department of the executive branch of the government of the State of Missouri with its offices located in Jefferson City, Cole County, Missouri.

10. Defendant, Arthur J. Mallory, is the Commissioner of the Department of Elementary and Secondary Education of the State of Missouri, and his official offices are located in Jefferson City, Cole County, Missouri.

11. Defendant, Dr. Leonard Hall, is an Assistant Commissioner of the Department of Elementary and Secondary Education of the State of Missouri with his official offices in Jefferson City, Cole County, Missouri.

12. Defendant, Special School District of the County of St. Louis, Missouri is a body politic and political subdivision of the State of Missouri, and is a real party at interest. The St. Louis County Special School District is situated entirely within the County of St. Louis, in the State of Missouri, with offices at 12110 Clayton Road, St. Louis, Missouri 63131.

13. Defendant, Board of Education of the Special School District of the State of Missouri is the duly constituted, elected and acting governing body of said district, said district being organized, operated and administered pursuant to the laws of the State of Missouri and may be served with process by serving the clerk thereof at the Board's administrative offices at 12110 Clayton Road, St. Louis, Missouri 63131.

14. Defendant, Allan G. Barclay, is a Director of the Special School District of the State of Missouri, resides in the County of St. Louis, State of Missouri, and maintains his official office at 12110 Clayton Road, St. Louis, Missouri 63131.

15. Defendant, Gerald K. Braznell, is a Director of the Special Schocl District of the State of Missouri, resides in the County of St. Louis, State of Missouri, and maintains his official office at 12110 Clayton Road, St. Louis, Missouri 63131.

16. Defendant, Gerald B. Hansen, is a Director of the Special School District of the State of Missouri, resides in the County of St. Louis, State of Missouri, and maintains his official office at 12110 Clayton Road, St. Louis, Missouri 63131.

17. Defendant, Thomas E. Smith, the Superintendent of Schools of the Special School District of St. Louis County, Missouri, maintains his official offices at 12110 Clayton Road, St. Louis, Missouri, and is a resident of the County of St. Louis in the State of Missouri.

18. Defendant, Department of Mental Health of the State of Missouri, is a department of the executive branch of the government of the State of Missouri and its offices are located in Jefferson City, Cole County, Missouri.

19. Defendant, Norman Tice, is the Commissioner of Mental Health for the State of Missouri and maintains his official offices in Jefferson City, Cole County, Missouri.

20. Defendant, Dr. Beverly Wilson, is the Acting Director of the Department of Mental Health of the State of Missouri, and has her official offices located at Jefferson City, Cole County, Missouri.

21. Defendant, John Twiehaus, is the acting superintendent of the St. Louis State Hospital at 5400 Arsenal Street, St. Louis, Missouri.

22. Defendant, Dr. Milton Fujita, is the former Medical Director of the Youth Center of the St. Louis State Hospital and resides in the County of St. Louis, Missouri. Dr. Fujita maintains an office at 11906 Manchester Road, St. Louis, Missouri.

IV.

First Claim for Relief:
Deprivation of Plaintiff's Right to a Full Educational Opportunity

23. Plaintiff, Terri Ann Miener, a minor of the age of 17, born May 1, 1962, is currently a voluntary resident at the St. Louis State Hospital at 5400 Arsenal Street in the City of St. Louis. Due to recurrent brain tumors and subsequent ill-effects of the surgery to remove those tumors, Terri Ann has suffered and continues to suffer from a dimished capacity for learning and has exhibited great difficulties in her emotional and behavioral development as a direct result thereof.

24. In September, 1976, Terri Ann was released from the hospital after cranial surgery and after post-operative recovery time, and was taken to Defendant, Special School District of St. Louis County, Missouri, for evaluation of her ability and capacity to be educated. The report of the Special School District's evaluation clinic, dated February 4, 1977, indicated the serious educational, emotional and behavioral disabilities of Terri Ann. A reevaluation was performed at the request of Plaintiff, Clyde J. Miener, on May 19, 1978. These reports found that Terri was learning disabled, behaviorally disordered, visually impaired and orthopedically handicapped.

25. During most of 1977, Terri Ann was placed in the Youth Center of the St. Louis State Hospital as a voluntary patient. On June 23, 1977, Terri Ann was voluntarily admitted as a full time resident at the Youth Center at the St. Louis State Hospital.

26. Terri Ann has a very limited attention span and her memory is intermittent. She demands constant attention from those persons teaching or otherwise caring for her. She is approximately four (4) years behind normal in her physical development. She is visually impaired.

27. Because of her multiple mental and physical handicaps, Terri Ann requires a one-on-one teaching environment. She needs constant reminders to stay with the task at hand, she needs continual encouragement and guidance. Terri Ann becomes anxious and disruptive when left to herself.

28. For these reasons, a highly structured learning environment is needed. She needs a continuous, supportive and warm relationship with her educators in a residential setting. She is not receiving the benefits of such a program from the St. Louis State Hospital nor the Special School District of St. Louis County, Missouri. These agencies simply do not have the time, staff, facilities or funds to provide for Terri Ann's needs. For the last three years, her education has been wholly inadequate.

29. Defendant, State of Missouri, individually and by and through its Departments of Mental Health and Elementary and Secondary Education, receives funding from the government of the United States under Title 20 of the United States Code and other authorities.

30. Under the provisions of Title 20, United States Code, Section 1411-1420, in order to qualify for assistance under the Sub-Chapter II Assistance for Education of All Handicapped Children Act [hereinafter Sub-ChapterII], a state must have in effect a policy which assures that all handicapped children are given a free and appropriate public school education. In spite of this mandate, defendant State of Missouri, and its Departments of Mental Health and Elementary and Secondary Education have failed to satisfy their duty of providing full educational opportunity for Terri Ann as required by 20 U.S.C. §1412. Under the requirements of 20 U.S.C. §1412(2)(B) a free appropriate public education must be made available to all children.

31. Under the provisions of 20 U.S.C. §§1411-1420, and the rules and regulations promulgated thereto by the Department of Health, Education and Welfare, each local educational agency

of the State of Missouri, in order to receive funds under Sub-Chapter II, must maintain records of the individualized education program (I.E.P.) of each student, and each public agency must provide special education and related services to handicapped children in accordance with that I.E.P.

32. Defendant, Special School District of St. Louis County, pursuant to the rules and Regulations promulgated under Sub-Chapter II by the Department of Health, Education and Welfare, must assure that, any placement in a public or private residential program made necessary to provide special education and related services to a handicapped child, including non-medical care and room and board, be at no cost to the parents of the child.

33. As previously stated, Defendant State of Missouri, individually and by and through its agents and departments, Defendants herein, has received funding from the Government of the United States for the financing of programs concerning the training and education of handicapped children of the State of Missouri. The State of Missouri, its Department of Elementary and Secondary Education, acting by and through Defendants Mallory, Hall, and the Special School District of St. Louis County, acting by and through Defendants Mallory, Hall, and the Special School District of St. Louis County, acting by and through Defendants Tice, Smith, Barclay, Braznell and Hansen, has failed to provide an appropriate educational opportunity for Terri Ann in that it has failed to provide appropriate residential education and treatment which is required to provide Terri Ann with a full educational opportunity as mandated by Federal statute and regulation.

34. Furthermore, according to the H.E.W. Regulations, it is the responsibility of the Missouri Department of Elementary and Secondary Education to insure that all other state agencies establish and implement a goal of providing full educational opportunity to all handicapped children in the area served by those

public agencies. Each educational program for handicapped children administered within the state, including each program administered by any non-education agencies must (a) be under the general supervision of the persons responsible for educational programs for handicapped children in the state educational agency and (b) meet educational standards of the state educational agency. The State of Missouri and its Department of Elementary and Secondary Education have failed to comply with these rules and regulations. Moreover, the Department of Mental Health of the State of Missouri by and through Defendant's Tice, Wilson, Twiehaus, and Fujita, has failed to establish and implement a program designed to provide a full educational opportunity for Terri Ann. These Defendants' actions have deprived her of her right to a full education.

35. Under the provisions of 20 U.S.C. §1415, jurisdiction is granted to the federal district courts to review matters of this nature raised by aggrieved parents following the due process hearing procedures set out in this section.

36. Plaintiffs have not exhausted the administrative hearing remedy as set out in 20 U.S.C. §1415. There are three reasons why Plaintiffs cannot exhaust the administrative remedies prior to seeking the jurisdiction of this Court.

A. Plaintiff, Terri Ann Miener, while in the custody of the St. Louis State Hospital, has been and will continue to be subject to great physical abuse and serious bodily injury as a result of the intentional assaults upon her by unknown persons at the State Hospital. She remains in great personal danger each day she remains in that facility. The delays inherent in the "due process procedure" of 20 U.S.C. §1415 will cause continued physical injury and irreparable harm to Terri Ann.

B. Plaintiff's next friend and parent, Clyde J. Miener, has made repeated requests to all Defendants herein named to properly evaluate Terri Ann, and thereby establish a proper in-

dividual education program so that Terri Ann might enjoy her rights under federal law to a full appropriate public education. Plaintiff's next friend's numerous attempts to resolve this matter through the state agencies herein named as Defendants clearly demonstrates it would be a useless and unconscionable delay to require Plaintiffs to exhaust the administrative procedures as established by the State of Missouri, in the face of the State's continual inaction. It is clear that each and every day which Terri Ann spends at the State Hospital facility and not in a proper residential placement where she can get appropriate education, irreparably damages her overall capacity to be educated.

C. Furthermore, it is clear that the due process hearing requirements set out in 20 U.S.C. §1415 are illegally and improperly implemented in the Missouri Statutes which establish the State's hearing procedure, V.A.M.S. §§162.961-162.965. These statutory procedures cause delay and do not further the aims of Sub-Chapter II in three particular, ways:

(1) The Missouri Statutes require the due process hearings are to be conducted by an improper person. V.A.M.S. §162.961(1) specifically requires the initial due process hearing be conducted by the chief administrative officer of the responsible school district. Defendant, State of Missouri has not followed the requirements of the Rules and Regulations of the Department of Health, Education and Welfare, at Volume 42 of the Federal Register, Pages 42494-96, Section 121a.507(a), which forbid hearings conducted by persons who are employees of the public agency. The chief administrative officer is clearly an "employee" of the public agency involved in the education of the child, and therefore, an improper hearing examiner.

(2) The minimal time requirements to pursue the Missouri procedure are more than twice the maximum allowable time provided in the H.E.W. Regulations. The Federal requirement under 42 Fed. Reg., Pg. 42496, Section 121a.512, requires that the agency having initial responsibility (local school district) for

the due process hearing provide a final decision within 45 days of receipt of a request for such hearing. However, under V.A.M.S. §162.950, the hearing with the chief administrative officer of the school district must be made within 30 days of notice from the aggrieved parent. The parent may then appeal to a three person panel set up by the local school district within ten days after receiving notice. After "proper deliberation" such panel shall determine whether the case warrants formal review by the Board of Education. Thereafter, upon receipt of the recommendation of the panel or upon written request of the parent, the local school board has 30 days in which to hold hearings on the matter in question, and 30 days from that hearing in which to render its opinon. Thus, the total time set out in the Missouri Statute for compliance with the due process hearing requirement of 20 U.S.C. 1415 is in excess of 100 days, far exceeding the required maximum 45 day period set out in the federal law.

(3) There is no procedure in Chapter 162 V.A.M.S. establishing a review procedure for an aggrieved parent to present his views before the State Board of Education (except in the case of cases concerning state schools, §162.962 V.A.M.S.) as required by the Rules and Regulations promulgated pursuant to 20 U.S.C. §1415 as found in Volume 42 of the Federal Register at Page 42496, Section 121a.510.

(4) For the foregoing reasons, the administrative hearing procedures set up by the Missouri Statutes do not comply with the requirements of 20 U.S.C. §§1411-1420. Moreover, the administrative hearing procedure set up by the Missouri Statutes unconstitutionally deprive Plaintiffs or their due process rights in that they create so cumbersome a procedure as to make it impossible for Plaintiffs to determine and protect their rights within a reasonable time.

Second Claim for Relief
Denial of Equal Access to Publicly Supported Education

37. Defendants, Mallory, the Department of Elementary and Secondary Education of the State of Missouri, Special School District of Missouri, Smith, Barclay, Braznell, Hansen and the Board of Education of the Special School District of St. Louis County, Missouri have established and do maintain a special school program in the County of St. Louis; that as a part of their program they provide special education services for the mentally and physically handicapped and retarded.

38. Plaintiff, Terri Ann Miener, since the beginning of the fall term of 1977, has been a domiciliary of St. Louis County, willing and able to participate in appropriate special education programs of the Board of Education of the Special School District of the County of St. Louis, and is fully eligible to participate if any should be implemented for her.

39. The above named Defendants have refused to allow Plaintiff Terri Ann Miener, to fully participate in their programs and have provided for her mere custodial care. Such refusal on the part of said Defendants is discriminatory, arbitrary, capricious, unreasonable and without just cause; Plaintiff, Terri Ann, has and will continue to sustain damages as a result thereof.

40. Such refusal of said Defendants is a denial of Plaintiff, Terri Ann's, rights to equal protection under the law and is a denial of due process of law as guaranteed to this Plaintiff by the Fifth and Fourteenth Amendments of the United States Constitution.

41. Defendants, by such refusal, are using public monies and public lands for discriminatory purposes, contrary to law.

42. An injunction should be granted enjoining Defendants and each of them from refusing to allow Plaintiff, Terri Ann

Miener, to fully participate in the programs of the Special School District of the County of St. Louis; irreparable damage has occurred and will continue to result if an injunction is not granted, for the reason that Plaintiff, Terri Ann Miener's, overall capacity to learn will diminish with each and every day of said Defendant's failure to allow said Plaintiff to participate in Defendants' special education program.

Third Claim for Relief:
Denial of Equal Access to Treatment

43. Defendants, Wilson, Tice, the Department of Mental Health in the State of Missouri, Twiehaus and Fujita, acting under the authority of the State of Missouri supervise, manage and maintain a Youth Center and a State Hospital for the mentally incompetent; as a part of their program they have established custodial wards and facilities to house the mentally incompetent, especially youths with various behavioral disorders; Plaintiff, Terri Ann, is housed in the Youth Center of the St. Louis State Hospital under the care, custody and control of aforesaid Defendants.

44. Said Defendants maintain the facilities by means of public revenues, and use public lands in supporting, maintaining and sponsoring said mental health programs.

45. Plaintiff, Terri Ann, has been a day care resident or full time resident at the Youth Center facility since June, 1977.

46. Above named Defendants have discriminatorily refused to allow Plaintiff, Terri Ann, the opportunity to be fully educationed as is her right under 20 U.S.C. §§1411-1420, and in violation of her rights under the Fifth and Fourteenth Amendments of the Constitution of the United States.

47. Aforesaid Defendants have discriminated against Plaintiff, Terri Ann, on the basis of her physical and mental han-

dicaps in violation of 29 U.S.C. §794 by their refusal to give Plaintiff, Terri Ann Miener, equal access to all facilities, all programs and in particular, the programs of education available to other persons similarly situated.

48. Such refusal on the part of Defendants is discriminatory, arbitrary, capricious, unreasonable, and without just cause; Plaintiff has suffered and will continue to suffer damages as a result thereof.

49. The aforesaid activities of Defendants constitute a denial of Plaintiff, Terri Ann's equal protection and is a denial of due process of law as guaranteed to this Plaintiff by the Fifth and Fourteenth Amendments of the United States Constitution.

50. Defendants, by such refusal, are using public monies and public lands for discriminatory purposes, contrary to law.

51. Futhermore, Plaintiff, Terri Ann, has suffered and will continue to suffer physical injury, abuse, pain and suffering as a direct result of the discriminatory activities of said Defendants who knew or should have known that their acts, constituting a denial of Terri Ann's right to equal protection of the law, would so injure her.

52. A preliminary and permanent injunction should be granted enjoining these Defendants and each of them from refusing to allow Plaintiff Terri Ann equal access to all programs and facilities of Defendants' organizations; irreparable damage has and will continue to result if an injunction is not granted, for the reason that Plaintiff, Terri Ann Miener's, overall capacity and ability to be educated will be irreparably harmed, for which there is no adequate remedy at law.

Fourth Claim for Relief:
Plaintiff Terri Ann Miener's Personal Injuries

53. During the time of her residency at the St. Louis State Hospital, Plaintiff, Terri Ann, has been the subject of attacks and beatings by her fellow residents and has also been the object of injuries suffered because of the negligent acts of the medical and custodial staff of the hospital.

54. During this time, the St. Louis State Hospital and the facility in which Terri Ann is a resident, were under the supervision and control of the Defendants, Twiehaus and Fujita. These Defendants were responsible for, and did attempt to supervise and operate the activities of the facility wherein Plaintiff, Terri Ann, resided, pursuant to V.A.M.S. §202.050.

55. It was the duty of the aforesaid Defendants to provide a suitably safe environment for the residents of the St. Louis State Hospital, one in which said residents were not subject to physical attacks or negligent injuries inflicted by the residents and staff of said facility.

56. Defendants failed to provide such a safe and secure facility.

57. Plaintiff, Terri Ann, was injured by unknown persons while a resident of the St. Louis State Hospital as a direct and proximate result of the failure of the aforesaid Defendants to provide a safe and secure facility.

58. The aforesaid Defendants acted in such a grossly negligent manner in their management and control of said facility as to place their conduct outside the scope of their official duties. Therefore, Defendants, Twiehaus and Fujita, are individually responsible the injuries inflicted upon the Plaintiff, Terri Ann Miener.

WHEREFORE, Plaintiffs respectfully pray this Court:

1. Declare §162.961-162.965 of the Statutes of Missouri unconstitutional on their face, and declare unconstitutional the acts of Defendants, their agents, employees or successors, in applying said Section in the manner as aforesaid.

2. Declare §162.961-162.965, V.A.M.S. violative of 20 U.S.C. §1415, and declare the acts of Defendants, their agents, employees or successors, in applying the provisions of these Sections to Plaintiffs as aforesaid to be violative of said United States Code.

3. Require Defendants to provide prospective relief in the form of compensatory services to overcome the effects of any past denial of special educational services as defined by the laws of the State of Missouri and by the laws of the United States as aforesaid. Such services can and should be provided at the Brown School in Austin, Texas, at no cost to the Plaintiff, Clyde J. Miener. It is respectfully submitted that the proper measure of the injury to Terri Ann because of the denial of a full opportunity to education is the cost of an educational program which can restore Terri Ann to the developmental level which she would have achieved by age twenty-one (21) if Defendants had fulfilled their obligation and duty to her. The State of Missouri and its Departments of Mental Health and Elementary and Secondary Education have failed to provide the proper levels of education for Plaintiff, Terri Ann, and therefore should be found liable to restore as best can be restored at this time, the educability and learning capacity of the Plaintiff, Terri Ann.

4. Award Plaintiffs judgment against all named Defendants, jointly and severally, the sum of Fifty Thousand Dollars ($50,000.00) for the injuries received by Plaintiff, Terri Ann, while in the custody and care of the named Defendants, by

whose actions, in depriving Terri Ann Miener of the equal protection of the laws, and depriving her of her civil and constitutional rights, grieviously injured her.

5. Issue injunctions enjoining Defendants, Wilson, Tice, the Department of Mental Health of the State of Missouri and Twiehaus, in his official capacity as Acting Superintendent of the St. Louis State Hospital, from discriminating against Plaintiff, Terri Ann Miener, by refusing to allow her equal access to all programs and facilities of said State Hospital; and issue an injunction enjoining these Defendants from enforcing any and all rules, regulations, decisions and policies which are discriminatory in nature, and which would prohibit the Plaintiff from having equal treatment as required by the law.

6. Issue injunctions enjoining the Defendants, Mallory, Hall, the Department of Elementary and Secondary Education of the State of Missouri, Smith, Barclay, Braznell, Hansen, the Board of Education of the Special School District of St. Louis County, Missouri, and Special School District of St. Louis County, Missouri, from discriminating against Plaintiff, Terri Ann Miener, by refusing to allow her to participate in the special education programs of said school district; and issue injunctions enjoining these Defendants from continuing to engage in such practices which are discriminatory in nature.

7. Grant damages against Defendants State of Missouri, Department of Mental Health, Department of Elementary and Secondary Education and Special School District of St. Louis County, Missouri, for violation of Plaintiffs' statutory and civil rights in denying to Plaintiff her rights to a full and adequate education as guaranteed by the laws of the United States in the amount of Four Hundred Seventy-Four Thousand Three Hundred Fifty-Eight Dollars ($474,358.00).

8. Award damages against Defendants, Twiehaus and Fujita, in the amount of Fifteen Thousand Dollars ($15,000.00) for the personal injuries received by Terri Ann Miener while a resident of the St. Louis State Hospital.

9. Plaintiffs respectfully pray this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited, and upon such hearing to grant such declaratory, injunctive, and monetary relief, and such other and further relief as may be just and proper in the determination of this Court.

10. Grant Plaintiffs the costs of the prosecution of this action, including but not limited to reasonable attorney's fees, suit costs and court costs.

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